

DRAFT RULE - VERSION 2

SECTION 1. 327 IAC 17 IS ADDED TO READ AS FOLLOWS:

Rule 1. Section 401 Water Quality Certification Application

327 IAC 17-1-1 General

Authority: IC

Affected: IC

Sec. 1. (a) The purpose of Article 327 IAC 17 is to establish procedures and criteria for the application, processing, and review of state water quality certifications required by section 401 of the federal Clean Water Act, 33 USC § 1341*. It is the purpose of this article, consistent with the Clean Water Act, to maintain the chemical, physical, and biological integrity of the waters of the state.

(b) It is the policy of the department to achieve no overall net loss of the existing wetlands resource base with respect to wetlands acreage and uses in the state.

*The federal Clean Water Act is incorporated by reference. Copies of this law may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room N1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board; 327 IAC 17-1-1*)

327 IAC 17-1-2 Applicability

Authority: IC

Affected: IC

Sec. 2. (a) This article governs the issuance of state certifications by the department pursuant to the following portions of section 401 of the Clean Water Act, 33 USC §1341:

(1) Section 401(a)(1) requires that any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities that may result in any discharge into navigable waters of the United States shall obtain, from the state where the discharge originates or will originate, a certification that the discharge will comply with applicable provisions of sections 208(e), 301, 302, 303, 306, and 307 of the Clean Water Act (33 USC §§1311, 1312, 1313, 1316, and 1317).

(2) Section 401(d) requires the certification to set forth any requirements necessary to assure that the applicant will comply with the applicable provisions of the Clean Water Act and state law, including water quality standards.

(b) The requirements established by this rule shall apply to the following:

(1) A permit from the U.S. Army Corps of Engineers pursuant to:

(A) section 10 of the River and Harbors Act*; or

- (B) section 404 of the federal Clean Water Act**.
- (2) A license issued by the Federal Energy Regulatory Commission (FERC).

***IBR**

****The federal Clean Water Act, 33 U.S.C.A. 1251 to 33 U.S.C.A. 1387 is incorporated by reference. Copies of this law may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room N1255, Indianapolis, Indiana 46206. (Water Pollution Control Board; 327 IAC 17-1-2)**

327 IAC 17-1-3 Requirement for certification

Authority: IC

Affected: IC

Sec. 3. No person may conduct an activity that may result in a discharge, that requires a federal permit or license, into waters of the United States unless the person has received a certification or waiver under this article from the department. (Water Pollution Control Board; 327 IAC 17-1-3)

327 IAC 17-1-4 Definitions

Authority: IC

Affected: IC

Sec. 4. In addition to the definitions contained in IC 13-11-2, the following definitions apply throughout this rule:

(1) “Applicable provisions of the federal Clean Water Act and state law” include the provisions of sections 301, 302, 303, 306, 307 [33 USC §§ 1311, 1312, 1313, 1316, 1317] and other appropriate provisions of Indiana law, including state water quality standards.

(2) “Commissioner” means the commissioner of the department of environmental management.

(3) “Department” means the department of environmental management.

(4) “Practical alternative” includes an alternative that is feasible, available, and can satisfy the basic purpose of a proposed project. An alternative shall not be considered practicable if it will have an increased adverse impact on an aquatic ecosystem.

(5) “Water dependent” means an activity associated with a discharge requires access, proximity to, or siting within a water body in order to fulfill the basic purpose of the activity.

(Water Pollution Control Board; 327 IAC 17-1-4)

327 IAC 17-1-5 Application requirements

Authority: IC

Affected: IC

Sec. 5. (a) An application for water quality certification shall be submitted to the department in advance of commencement of the activity and must:

- (1) be on a form approved by the commissioner;**
- (2) be complete;**
- (3) be legible;**
- (4) contain the signed statement required by subsection (b) attesting to the truthfulness of information provided on the application; and**
- (5) be signed by the applicant.**

(b) An application required by subsection (a) must contain the following statement signed by the applicant: “I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”.

(c) If the applicant is a corporation, the application shall contain the name of the individual who shall be primarily responsible for the project that is to be certified.

(d) Where the department determines that more information is required in order to accomplish the review of the request for certification, it shall promptly notify the applicant and request such information. The application shall not be considered complete until the applicant has submitted the requested information.

(e) Upon receipt of a complete application, the department shall act upon the request for certification within one (1) year. If the department fails to act within one (1) year, then the certification may be deemed waived unless the federal permitting agency, in its discretion, accepts the certification after such time period has passed.

(f) The applicant has the burden of proving that its activity will comply with the applicable provisions of the federal Clean Water Act and state law. (*Water Pollution Control Board; 327 IAC 17-1-5*)

327 IAC 17-1-6 Public notice of water quality certification applications

Authority: IC

Affected: IC

Sec. 6. (a) The commissioner shall provide public notice and an opportunity to comment on applications submitted to the department for water quality certification under section 401 of the Clean Water Act.

(b) The public notice shall contain the following information:

- (1) The applicable statutory and regulatory authority.**

- (2) The name and address of the applicant and the applicant's agent, if any.
- (3) The name, address, and telephone number of the department's employee who may be contacted concerning the application.
- (4) The location of the proposed project.
- (5) A brief description of the proposed project, including the following:
 - (A) Its purpose and intended use.
 - (B) A description of structures, if any are to be erected.
 - (C) A description of the type, composition, and quantity of materials to be disposed of or discharged.
 - (D) Possible impacts to wetlands, streams, or other aquatic resources.
 - (E) A description of the compensatory mitigation proposed by the applicant, if any.
- (6) A statement that the public may view or obtain a copy of the plan and elevation drawing, if reproducible, showing the general and specific site location.
- (7) A statement that the comment period deadline shall be twenty-one (21) calendar days from the date of mailing of the public notice, unless otherwise specified.
- (8) A statement that any person may request in writing that a public hearing or meeting be held to consider the application.

(c) Public notice of an application for water quality certification shall be sent to the following:

- (1) The applicant.
- (2) Landowners adjacent to the proposed activity, as provided by the applicant.
- (3) The following agencies:
 - (A) Indiana department of natural resources.
 - (B) U.S. Environmental Protection Agency.
 - (C) U.S. Fish and Wildlife Service.
 - (D) The state or federal agency responsible for issuing water quality certification in a state whose water quality may be adversely affected by a proposed activity.
- (4) Any person who requests copies of public notices.

(d) Comments received by the department during the public notice comment period shall be considered by the department. The department may choose to forward comments received during the comment period to the applicant for a response. If the department chooses to forward comments, it must do so within three (3) working days of the close of the comment period. The applicant shall then provide the department with a written response to all comments forwarded by the department at the close of the comment period within fourteen (14) days of receipt of comments. If an applicant requires additional time to respond to comments, the applicant may inform the department in writing within the 14 day time period. The department shall then place the application on hold until the applicant provides a response. The department may deny certification if the applicant fails to provide a written response to comments as stipulated in this paragraph.

(e) The department shall issue a supplemental public notice of an application in the event of one (1) of the following:

- (1) The proposed project originally was denied water quality certification but the applicant has submitted a new or modified proposal.**
- (2) The proposed project has significantly changed since the application was originally public noticed and the department received comments from the public on the project as originally proposed.**
- (3) The recipient of a water quality certification requests a modification of the certification.**

(f) The department may issue a supplemental public notice for a project that has been significantly changed since the issuance of the first public notice but no public comment was received about the project as originally proposed.

(g) In lieu of the public notice issued by the department according to this section, a joint public notice shall be issued by the department and the U.S. Army Corps of Engineers (COE) utilizing the public notice procedures set forth in 33 CFR § 325.3, regarding an application for water quality certification concerning a project that requires a COE individual permit. (*Water Pollution Control Board; 327 IAC 17-1-6*)

327 IAC 17-1-7 Public hearing or meeting

Authority: IC

Affected: IC

Sec. 7. (a) A person may request in writing that a public hearing be held to consider issues related to water quality in connection with a specific application for certification. This request should be made during the public comment period and state the reason for requesting the public hearing as specifically as possible.

(b) The department may hold a public hearing if:

- (1) substantial questions are raised;**
- (2) new information is obtained about water quality issues; or**
- (3) significant interest is expressed in the project.**

(c) The department shall publish a public notice of a scheduled public hearing setting forth the date, time, and place. The department shall attempt to locate the public hearing in the vicinity of the proposed project.

(d) Any person may appear and present oral or written comments concerning the proposed project.

(e) The public hearing shall be recorded and a transcript prepared. A copy of the transcript may be purchased from the department or the transcriber of the public hearing. A copy shall be available for public inspection during normal business hours at the department.

(f) The applicant will be encouraged to attend any public hearing.

(g) Any person may request that the department hold a public meeting in lieu of a public hearing.

(h) The department may decide to hold a public hearing or public meeting on its own initiative.

(i) The department shall consider the comments received at the public hearing before a decision is rendered on the application. (*Water Pollution Control Board; 327 IAC 17-1-7*)

Rule 2. Review of section 401 water quality certification applications

327 IAC 17-2-1

Authority: IC

Affected: IC

Sec. 1. An activity that requires a federal license or permit and that may result in a discharge to waters of the United States shall be reviewed for compliance with the applicable provisions of the federal Clean Water Act and state law, including state water quality standards. After such a review, the department shall:

- (1)** grant certification if the activity will comply with the applicable provisions of sections 301, 302, 303, 306, 307 [33 USC §§ 1311, 1312, 1313, 1316, 1317] and other provisions of state law, including state water quality standards;
- (2)** grant conditional certification, in which case the certification shall contain those conditions and requirements the department deems necessary to ensure that the applicant complies with the applicable provisions of federal and state law;
- (3)** deny certification if the activity will not comply with the applicable provisions of federal and state law; or
- (4)** waive certification if more than one (1) year has passed since the department received a complete application from an applicant for water quality certification, unless the federal permitting agency chooses to accept a certification subsequent to the expiration of one (1) year.

(*Water Pollution Control Board; 327 IAC 17-2-1*)

Rule 3. Mitigation of Water Quality Impacts

327 IAC 17-3-1 Mitigation requirements concerning timing

Authority: IC

Affected: IC

Sec. 1. Compensatory mitigation shall be required for all unavoidable impacts to aquatic resources unless it is determined by the commissioner that there is no detrimental impact to water quality. The following requirements shall be met in providing compensatory mitigation:

- (1)** Mitigation shall be constructed and proven successful before the proposed impact will be allowed to affect one (1) or more of the following circumstances:

(A) A Tier II wetland.

(B) A situation where the department determines:

(i) the mitigation proposed will have a high probability of failure; or
(ii) the temporal loss of the wetland uses will cause a significant degradation to the quality of a water of the state.

(ii) The applicant does not guarantee compensatory mitigation with a performance bond or irrevocable letter of credit as specified in 327 IAC 17-3-3.

(2) Mitigation shall be performed within one (1) year of the date of issuance of the section 401 certification for a project the department determines not to hold to the requirement of subdivision (1) unless a written extension is granted by the Commissioner.

(Water Pollution Control Board; 327 IAC 17-3-1)

327 IAC 17-3-2 Location of mitigation

Authority: IC

Affected: IC

Sec. 2. (a) If practicable, mitigation of wetland impacts should occur on the same site as the location of the project and its associated impacts.

(b) Offsite mitigation shall be required where the department determines that onsite mitigation has a low probability of success. One (1) of the following shall be met in providing offsite mitigation:

(1) An impact being mitigated through the use of a mitigation bank must occur in the mitigation bank's service area as stipulated in the mitigation bank's charter.

(2) Offsite mitigation not using a mitigation bank shall, to the greatest extent possible, be located within the same fourteen digit United States Geological Survey Hydrologic Unit Code (USGS HUC) as the impact site. If this is not practicable, mitigation shall be located according to the following restrictions:

(A) An impact to a Tier I wetland shall be mitigated in accordance with the following:

(i) Less than or equal to twenty-five hundredths (0.25) acre of impacted wetlands shall be mitigated within the same USGS HUC eight-digit watershed as the project impact occurs.

(ii) Greater than twenty-five hundredths (0.25) acre of impacted wetlands shall be mitigated within the same USGS HUC eleven-digit watershed as the project impact occurs.

(B) An impact to a Tier II wetland, regardless of size, shall be mitigated within the same USGS HUC fourteen-digit watershed as the project impact occurs.

(c) If a mitigation site cannot be located in compliance with this rule, then the department shall deny certification for the proposed activity.

(Water Pollution Control Board; 327 IAC 17-3-2)

327 IAC 17-3-3 Financial responsibility concerning mitigation

Authority: IC

Affected: IC

Sec. 3. (a) Compensatory mitigation for Tier 1 wetlands as defined in 327 IAC 2-1.8 shall be guaranteed by one (1) of the following before impacts are made:

- (1) Completion and proven successful prior to impacts.**
- (2) A performance bond for the cost of construction and any outstanding liens on the property.**
- (3) An irrevocable letter of credit for the cost of construction and any outstanding liens on the property.**

(b) Compensatory mitigation for Tier 1I wetlands as defined in 327 IAC 2-1.8 shall be guaranteed by completion and proven successful prior to impacts.

(c) The applicant shall be released from the required financial assurances of subsection (a) when:

- (1) the mitigation has achieved success criteria according to section 5 of this rule for at least two (2) consecutive years; and**
- (2) the department releases the mitigation from monitoring required by section ??? of this rule.**

(Water Pollution Control Board; 327 IAC 17-3-3)

327 IAC 17-3-4 Future land use of a mitigation site

Authority: IC

Affected: IC

Sec. 4. (a) The mitigation shall be protected into perpetuity through one (1) of the following methods that have been signed and submitted to the department within 60 days of the date of issuance of a section 401 certification:

- (1) A conservation easement held by a third party committed to conservation and maintenance of the property and its wetland uses.**
- (2) A deed restriction that legally binds the property owner to maintain the property's wetland uses.**

(b) The applicant may transfer responsibility for the perpetual maintenance of a mitigation site by submitting to the department a written request which identifies the legally responsible party, a statement from that party that they accept and understand the legal requirements of this transfer. All transferences must be approved in writing by the Commissioner.

(Water Pollution Control Board; 327 IAC 17-3-4)

327 IAC 17-3-5 Success criteria for a mitigation site

Authority: IC

Affected: IC

Sec. 5. (a) The department shall require a mitigation site to meet the following minimum success criteria:

- (1) Wetland areas of a mitigation site shall meet the wetland jurisdictional requirements of the U.S. Army Corps of Engineers.**
- (2) A limitation of exotic and native nuisance species as determined by an annual survey that provides the following results:**
 - (A) The wetland plant communities are free of the following invasive exotic species, including:**
 - (i) purple loosestrife (*Lythrum salicaria*),**
 - (ii) common reed (*Phragmites australis*); and**
 - (iii) Eurasian water milfoil (*Myriophyllum spicatum*).**
 - (B) The combined aerial coverage of reed canary grass (*Phalaris arundinacea*) and the native nuisance species cattail (*Typha spp.*) shall not cover more than fifteen percent (15%) of a community type.**
- (3) No more than ten percent (10%) aerial coverage of the mitigation site may be:**
 - (A) open water;**
 - (B) bare ground, or**
 - (C) a combination of (A) and (B);****unless the applicant provides the department with documentation showing that the natural wetlands the mitigation site is attempting to recreate have a larger open water or bare ground component or the impacted wetlands contained larger areas of open water or bare ground.**
- (4) Aerial coverage of the mitigation site consists of a minimum seventy percent (70%) native vegetation.**
- (5) Replacement of the uses lost at the impacted wetland.**
- (6) Successful completion of the goals for the proposed mitigation.**

(b) Stream and river mitigation shall be considered successful:

- (1) after the applicant has demonstrated that success criteria specified in the approved mitigation plan have been met for 3 consecutive years and;**
- (2) The following success criteria has been achieved:**
 - (A) Reconstructed or relocated channels:**
 - (i) support a community of fish species equal to or greater in quality than the original channel.**
 - (ii) has comparable match the grade, hydraulic capacity, and basic channel geometry of the channels to be impacted.**
 - (B) An assessment, performed by the applicant and approved by the department, of overall bank stability determines:**
 - (i) the riparian corridor of a relocated stream meets or exceeds the original Qualitative Habitat Evaluation Index (QHEI) scores;**
 - (ii) the streambanks and bottom are stable; and**
 - (iii) no additional structural improvements or corrections are needed.**

Water Pollution Control Board; 327 IAC 17-3-5)

327 IAC 17-3-6 Monitoring

Authority: IC

Affected: IC

Sec. 6. (a) A mitigation site shall be monitored until the success criteria stipulated in the section 401 certification has been achieved for at least two (2) consecutive years.

(b) Vegetation monitoring shall occur:

(1) between June 1 and October 31; and

(2) annually within thirty (30) days of the anniversary date of the first monitoring event.

(c) The applicant shall be responsible for monitoring factors necessary to determine when a mitigation site has achieved the success criteria required. These factors may include the following:

(1) Vegetation sampling.

(2) Exotic species surveys.

(3) Growth rates for trees and shrubs.

(4) Planted species survival rates.

(5) Macroinvertebrate sampling.

(6) Amphibian sampling.

(7) Wildlife surveys.

(8) Groundwater and hydrology monitoring.

(9) Soils sampling.

(10) Water quality sampling.

(11) Delineation of the jurisdictional extent of wetlands on the site.

(12) As built survey of boundaries, elevations of structures, and topography.

(d) Presence of the exotic and native nuisance species in excess of the limits listed in section 5(a)(2)(A) and (B) of this rule shall result in an extension of the monitoring period required by this section to monitor the effectiveness of control measures and gauge the rate of infestation.

(e) The department may allow release from an extended monitoring period required by subsection (d) and the financial assurances required in section 3(a)(2) and (3) if one (1) of the following actions is taken by the applicant:

(1) The infestation of the exotic and native nuisance species is eliminated.

(2) Sufficient funding is provided in a long-term management trust to control the exotic and native nuisance species.

(f) Mitigation monitoring plans must be approved by the department prior to the commencement of mitigation activities.

Water Pollution Control Board; 327 IAC 17-3-6)

327 IAC 17-3-7 Wetland mitigation remediation

Authority: IC

Affected: IC

Sec. 7. (a) The applicant shall submit a remediation plan to the department within sixty (60) days of one (1) of the following:

(1) The mitigation site's inability to achieve:

(A) the target hydrology within two (2) growing seasons after completion of construction;

(B) the success criteria at least once within five (5) years; or

(C) the success criteria for two (2) consecutive years within seven (7) years of monitoring.

(2) At least two (2) years of monitoring data show the site trending away from achievement of the success criteria.

(b) A remediation plan shall include the following:

(1) Identification of the problem or problems preventing the mitigation site from achieving the success criteria.

(2) A course of action to eliminate the problem or problems. For example, a plan may include the following:

(A) Selection of an alternative mitigation site that is more suitable for the mitigation required.

(B) Replanting the mitigation site.

(C) Regrading the mitigation site.

(D) Construction of an upland buffer around the site.

(E) Herbicide treatment of exotic invasive vegetation.

(c) The applicant shall implement the remediation plan within one (1) calendar year of its approval by the department.

(d) The applicant shall develop a stream and river mitigation remediation plan that meets the following requirements:

(1) Specifies the applicant's response to the following possibilities:

(1) Structural failures.

(2) Damage from storm events.

(3) Downward trends in fishery communities which are the result of failed habitat structures within the mitigation channel.

(4) Die-off among plants or other vegetation features.

(2) Shall be approved by the department prior to the commencement of work on the project.

(3) May be modified or updated to reflect changes in the project or failures not anticipated by the department.

Water Pollution Control Board; 327 IAC 17-3-7)

327 IAC 17-3-8 Mitigation bank usage

Authority: IC

Affected: IC

Sec. 8. Utilization of a mitigation bank shall be allowed by the department if the following are met:

- (1) The mitigation bank has been approved by the department.**
- (2) The applicant has followed the avoidance and minimization requirements of section [REDACTED].**
- (3) The mitigation produced at the bank is determined by the department to compensate for the wetlands uses lost at the impact site.**

Water Pollution Control Board; 327 IAC 17-3-8)

327 IAC 17-3-9 Documentation Required: wetland mitigation plan

Authority: IC

Affected: IC

Sec. 9. (a) A plan describing wetland mitigation shall be:

- (1) prepared by the applicant if wetland mitigation is required; and**
- (2) approved by the department before a section 401 certification is granted.**

At a minimum, a wetland mitigation plan shall give details of the following:

- (A) Existing conditions, including the following:**
 - (i) Hydrology.**
 - (ii) Vegetation, including the presences of exotic invasive species.**
 - (iii) Current land use.**
 - (iv) Surrounding land use.**
 - (v) Soils.**
 - (vi) Topography.**
- (B) Acreage of impact and mitigation by wetland type.**
- (C) Description of mitigation goals.**
- (D) Description of mitigation methods.**
- (E) Planting lists.**
- (F) Narrative describing the following:**
 - (i) Planned hydrology.**
 - (AA) Methods and data used to estimate the planned hydrology.**
 - (BB) Planned seasonal high water elevation and depth.**
 - (CC) Planned mean water elevation and depth.**
 - (DD) Planned duration of saturation, inundation, or both.**
 - (ii) Planned vegetation communities developed by using “Classification of Wetlands and Deepwater Habitats of the United States”, U. S. Fish and Wildlife Service, Office of Biological Services, FWS/OBS-79/31, (December 1979)*, to list the wetland community types to be constructed.**
 - (iii) Planned hydrogeomorphology developed by using “A Hydrogeomorphic Classification for Wetlands”, U.S. Army Corps of**

Engineers, (1993)**, to classify each mitigation site by its planned hydrogeomorphology.

(G) Drawings, plans, and maps depicting the planned post construction state of the mitigation, at a minimum including the following:

- (i) Detailed topographic drawings.
- (ii) Cross sectional drawings including the following:
 - (AA) Depicted in National Geodetic Vertical Datum.
 - (BB) Planned grade elevation.
 - (CC) Water control elevation.
 - (DD) Planned mean water elevation.
 - (EE) Planned seasonal high water elevation.
- (iii) Planting plan related directly to water depths.
- (iv) Development plan of the property.
- (v) Aerial photographs of impact site and mitigation site prior to construction.
- (vi) General location map.
- (vii) Longitude and latitude of a point in the center of each mitigation site.

(b) The applicant for a stream and river project, that involves channelization, relocation, armoring, or other physical alteration where the department determines compensatory mitigation is warranted, shall submit a mitigation plan including the following information to characterize the stream and river impacts:

- (1) An assessment of the reaches of impacted streams within the project area utilizing the Qualitative Habitat Evaluation Index*** methodology.
- (2) An assessment of the in-stream habitat requirements of fish species that:
 - (A) are noted in the stream assessment required under subdivision (1); and
 - (B) includes a break down by species of the aspects of stream structure that impact and support the following:
 - (i) Foraging.
 - (ii) Breeding.
 - (iii) Nursery.
 - (iv) Refuge areas.
- (3) Details for the replacement of habitat types, including the following:
 - (A) Specifications for:
 - (i) pools;
 - (ii) riffles; and
 - (iii) in-channel or stream bank habitat structures.
 - (B) Project plans with depictions of the locations of the structures specified under clause (A).
 - (C) An explanation of the construction plans required by clause (B), including:
 - (i) the predicted success mitigation; and
 - (ii) detailed contingency plans should the success predicted under item (i) fail.
 - (D) A construction time schedule specifying the sequence of the construction

of the following:

- (i) the project.
- (ii) the mitigation.

(4) The establishment of control sample points upstream and downstream of the modified channel, noted on plan overview sheets with latitude and longitude coordinates and on aerial photos.

****The “Classification of Wetlands and Deepwater Habitats of the United States” U. S. Fish and Wildlife Service, Office of Biological Services, FWS/OBS-79/31, by Lewis M. Cowardin, Virginia Carter, Francis C. Golet, and Edward T. LaRoe, (December 1979), may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room N1255, Indianapolis, Indiana 46206.**

****This document, “A Hydrogeomorphic Classification for Wetlands”, U.S. Army Corps of Engineers, WRP-DE-4, (1993), is incorporated by reference. Notwithstanding language to the contrary in the primarily incorporated documents, the versions of all secondarily incorporated documents, which are those documents referred to in the primarily incorporated documents, shall be the versions in effect on the date of final adoption of this rule. Copies of this publication may be obtained from the U.S. Army Corps of Engineers, Waterways Experiment Station or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206.**

*****This document, National Geodetic Vertical Datum, is incorporated by reference. Notwithstanding language to the contrary in the primarily incorporated documents, the versions of all secondarily incorporated documents, which are those documents referred to in the primarily incorporated documents, shall be the versions in effect on the date of final adoption of this rule. Copies of this publication may be obtained from?????? or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206.**

******This document, Qualitative Habitat Evaluation Index, is incorporated by reference. Notwithstanding language to the contrary in the primarily incorporated documents, the versions of all secondarily incorporated documents, which are those documents referred to in the primarily incorporated documents, shall be the versions in effect on the date of final adoption of this rule. Copies of this publication may be obtained from?????? or from the Indiana Department of Environmental Management, Office of Water Management, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. *Water Pollution Control Board; 327 IAC 17-3-9)***

327 IAC 17–3-10 Documentation Required: Monitoring plan and reports

Authority: IC

Affected: IC

Sec. 10. (a) The applicant shall submit a monitoring plan before a section 401 certification is issued. At a minimum, a monitoring plan shall provide the following:

- (1) Description of the mitigation goals.**
- (2) Success criteria that must be met.**
- (3) Methods for evaluating the mitigation.**
- (4) Map of sample points.**
- (5) Monitoring schedule.**

(b) The applicant shall submit monitoring reports to the department as required by conditions specified by the section 401 certification. At a minimum, a monitoring report shall provide the following:

- (1) IDEM identification number (IDEM ID #).**
- (2) U.S. Army Corps of Engineer's Number.**
- (3) Project description.**
- (4) Reprint of the monitoring plan as required by subsection (a).**
- (5) Results of monitoring.**
- (6) Discussion of the mitigation's progress.**
- (7) Photographic documentation.**
- (8) Graphics illustrating the mitigation's progress over the monitoring period relative to the success criteria.**
- (9) A post construction report of the mitigation site which establishes baseline conditions at the mitigation site detailing final contours, wetland plantings, seedings, and a summary of changes in hydrology.**

(c) For stream and river mitigation, monitoring, testing, sampling, and reporting requirements shall be as follows:

- (1) The applicant shall perform tests and conduct sampling methods to monitor the development and overall success of relocated channels.**
- (2) The applicant shall submit a baseline report summarizing the construction process and the design features implemented to restore aquatic habitat.**
- (3) The applicant shall conduct an approved sampling protocol of newly constructed channels beginning at the time the channel construction is completed and water is released into the channels. Report of the sampling shall contain the following information:**

(A) A final survey of the grade, shape, and capacity of new channels to verify that these criteria match the original channels that were impacted.

(B) Annual fisheries sampling:

(i) shall be conducted:

(AA) in July of the year after the release of water into relocated channels;

(BB) for a period of no less than five (5) years with report submission of results to the department within thirty (30) days of the completion of sampling activities;

(CC) from points established through discussions between the applicant and the department; and

(ii) shall provide results:

(AA) that are in accordance with the department's indices of biotic integrity (IBI) protocols and index calculations.

(BB) of qualitative habitat evaluation index (QHEI) assessments, conducted at the same points used for IBI sampling, shall commence on the same schedule and duration as stated in Part B preceding this section.

(4) The applicant has the following responsibilities of annual reporting to the department:

(A) To include the following:

(i) Summary and raw data sheets.

(ii) A narrative overview of the results of the surveys.

(iii) A comparison of the results to the success criteria.

(iv) An explanation, if a downward trend is noted according to the comparison under item (iii), that includes:

(AA) a description of necessary modifications to the remediation plan required by section 7(d) of this rule; and

(BB) a time schedule for implementing the remediation plan as agreed upon through discussion with the department or permit conditions.

(B) To provide the results of testing and monitoring conducted according to subdivision (3) that shall be:

(i) evaluated annually by the department to compare the project to the success criteria; and

(ii) used to determine if additional action or monitoring is warranted.

(C) To inspect habitat structures and features placed within the channel to assess:

(i) their condition regarding potential or actual structural failure within the channels; and

(ii) excessive accumulation of sediment or debris and other maintenance issues.

(5) The applicant shall:

(A) notify the department of observation of failure of the mitigation based on the result of the monitoring tests and sampling performed as required by subdivision (1); and

(B) initiate the remediation plan required by section 7(d) of this rule.

(Water Pollution Control Board; 327 IAC 17-3-10)

327 IAC 17-3-11 Mitigation ratios

Authority: IC

Affected: IC

Sec. 11. (a) Mitigation ratios shall be determined by the department based on the assessment of the following regarding the mitigation site:

(1) Probability of success, according to the following:

(A) the department shall require a higher mitigation ratio for mitigation that has a lower probability of success.

(B) the department shall consider each of the factors in Table 11(a) when determining a mitigation site's probability of success:

Table 11(a) Factors determining probability of success		
LOW	MEDIUM	HIGH
Creation		Restoration
Grading required to establish hydrology		No grading required to establish hydrology
Basin side slope >10%	Basin side slope <10%, >5%	Basin side slope <5%
Isolated from natural areas	Within 1 mile of a high quality natural area	Adjacent to high quality natural areas
Exotic invasive species found on the site or on adjacent property		
Upland buffer incomplete, or absent	Upland buffer <30' wide	Upland buffer >30' wide
Hydrology controlled by an outfall structure		Outfall structure not needed to regulated hydrology
Permanently inundated water regime		
Hydrology delivered to the site via pump or pipe		
Site utilized for storm water detention		
Water fluctuates greater than 1.5' above the ground		
Surrounding land use: residential, commercial, or industrial	Surrounding land use: agriculture	Surrounding land use: CRP, timber, nature preserve, wildlife areas, or other natural areas
Forested goal with no herbaceous planting or seeding		Forested goal with full complement of herbaceous seeding and/or planting

No quick emerging herbaceous cover, or herbaceous cover inappropriate for hydrologic conditions		Quick emerging native herbaceous cover species such as Echinochloa sp., Eleocharis spp., Leersia oryzoides, and Agrostis alba palustris seeded in significant amounts in addition to other planting or seeding.
No planting, “natural recruitment”	Seeded and/or planted with <30 species	Seeded and/or planted with >30 species
		Broad spectrum seeding to compensate for unpredictable final hydrodynamics.
No long term management provisions	Site to be donated to a responsible conservation group which agrees to care for it	Financial arrangements for the long term management of the site

(2) Anticipated maturation rate that shall be used by the department in a direct relationship to the size of the mitigation site to be provided with the understanding that the longer the mitigation takes to mature the higher the mitigation ratio to be required. Maturation rate shall be determined by the department based on scientific and technical publications and the following criteria:

(A) The length of time, measured in growing seasons as determined by the department, that the planned vegetation community at the mitigation site needs to reach maturation shall be considered to be:

- (i) a short maturation rate, if one (1) to five (5) growing seasons are needed to reach maturity;**
- (ii) a moderate maturation rate, if six (6) to ten (10) growing seasons are needed to reach maturity; or**
- (iii) a long maturation rate, if more than ten (10) growing seasons are needed to reach maturity.**

(B) The following types of planned vegetation at the mitigation site shall be used by the department to estimate the number of growing seasons needed to reach maturity:

(i) For a forested community:

- (AA) the number of growing seasons the planned dominant tree species requires to grow to the lesser of its maximum diameter at breast height (d.b.h.) or nine (9) inches d.b.h.; or**
- (BB) an average of the number of years to maturity if more than one tree is planned as co-dominant species.**

(ii) For a shrub community:

(AA) the number of years the planned dominant shrub species requires to grow to the greater of its maximum height or age of reproduction; or

(BB) an average of the number of years to maturity if more than one shrub is planned as co-dominant species.

(iii) For a herbaceous community:

(AA) the number of years required for the slowest growing planned dominant species planted to germinate; and

(BB) reach the greater of its maximum height or age of reproduction.

(b) The department shall:

(1) require between one and one-half (1.5) acres and five (5) acres of mitigation to replace each acre of wetland lost in order to compensate for:

(A) unavoidable mitigation failure; and

(B) temporal loss of wetland uses.

(2) determine a mitigation ratio to be required using the probability of success and maturation rate criteria of subsection (a) in a relationship set by the following table 11(b):

Table 11(b) Mitigation Ratio Matrix				
		Maturation Rate		
		Short	Moderate	Long
Probability of Success	High	1.5:1	2:1	3:1
	Medium	2:1	3:1	4:1
	Low	3:1	4:1	5:1

(c) Mitigation, proposed to meet the requirements of subsections (a) and (b), shall meet the following requirements:

(1) Rehabilitation, preservation, or projects involving both shall:

(A) prevent a net loss of wetland acreage by providing a minimum acreage of wetland restoration, creation, or both equal to the acreage of impact, unless the department determines to allow an exception in instances when the following conditions are met:

(i) The applicant shall not impact Tier II wetlands.

(ii) The applicant can show that allowing preservation or rehabilitation as the only method of mitigation shall not cause a net loss of wetland acreage in the USGS HUC six-digit watershed.

(iii) The area to be preserved or rehabilitated meets the qualifications for OSRW nomination.

(iv) The secondary and cumulative effects resulting from the impact are insignificant.

(B) be allowed by the department where rehabilitation or preservation is proposed in conjunction with creation or restoration as mitigation.

(2) Enhancement, the conversion of one wetland type to another with a higher perceived value, shall not be considered a valid form of mitigation, but rather an impact to wetland uses.

(Water Pollution Control Board; 327 IAC 17-3-11)

Rule 4. Issuance, revocation or modification of certification

327 IAC 17-4-1 Departmental action regarding a section 401 certification

Authority: IC

Affected: IC

Sec. 1. The department shall issue one (1) of the following decisions concerning an application for a section 401 water quality certification after an assessment review completed according to the provisions of 327 IAC 17-1, 327 IAC 17- 2, and 327 IAC 17-3:

(1) Grant a section 401 water quality certification if the department determines the activity will comply with the applicable provisions of federal and state law.

(2) Grant a conditional section 401 water quality certification that shall contain conditions and requirements the department deems necessary to ensure that the applicant complies with the applicable provisions of federal and state law.

(3) Deny a section 401 water quality certification if the activity will not comply with the applicable provisions of federal and state law or if the applicant fails to provide a complete application.

(4) Waive a section 401 water quality certification if the department has failed to make a final determination within one (1) year of its receipt of a complete application, unless the federal permitting agency chooses to accept a certification subsequent to the expiration of one (1) year.

(Water Pollution Control Board; 327 IAC 17-4-1)

327 IAC 17-4-2 Revocation or modification of a section 401 water quality certification

Authority: IC

Affected: IC

Sec. 2. (a) The department may revoke a section 401 water quality certification if one (1) of the following occurs:

(1) The applicant does not comply with one (1) or more condition of the water quality certification.

(2) The applicant has caused or is likely to cause a violation of a state water quality standard or other applicable statutory or regulatory requirement.

(3) The applicant is in violation of one (1) of the following:

(A) Construction of mitigation measures as required by the water quality certification.

(B) Construction of the project according to plans or specifications reviewed

by the department.

(4) The applicant has:

(A) failed to disclose fully all relevant facts; or

(B) misrepresented relevant facts;

in the application or during the application process.

(5) The applicant has failed to submit the monitoring reports or post-construction reports or documents as required by 327 IAC 17-3.

(b) The department:

(1) may modify an issued water quality certification in accordance with the following:

(A) If the recipient of a certification requests a modification of its certification, then a new application must be submitted to the department describing changes or revisions to the project and associated impacts.

(B) To ensure compliance with applicable provisions of federal and state law, because of changes since issuance of the certification, including changes in:

(i) construction or operation of the project;

(ii) characteristics of the receiving water;

(iii) the applicable water quality criteria; or

(iv) applicable effluent limitations or other requirements of state law.

(2) shall process the application for modification as if it were an original application.

(Water Pollution Control Board; 327 IAC 17-4-2)

Rule 5. Notice and appeal of final decision

327 IAC 17-5-1 Notice of final decision

Authority: IC

Affected: IC

Sec. 1. (a) The department shall serve notice of the final decision by certified mail on the applicant and the following persons:

(1) Those who submitted comments.

(3) Those who requested notice of the final decision.

(b) For purposes of this rule, “final decision” means a decision by the department to issue, deny, modify, revoke, or waive a section 401 water quality certification.

(c) A final decision regarding a section 401 water quality certification issued by the department may be appealed in accordance with IC 4-21.5, the Administrative Orders and Procedures Act. A notice of final decision shall include reference to the procedures available to appeal a final decision by requesting an adjudicatory hearing.

(d) A final decision shall become effective fifteen (15) days after service of the mailing is made, unless a petition for review and a petition for stay are filed with the Office of Environmental Adjudication (OEA) within that fifteen (15) day period. The petition for review and the petition for stay must be filed in accordance with IC 4-21.5-3-5.

Rule 6. Conditions applicable to a section 401 water quality certification

327 IAC 17-6-1 Responsibilities

Authority: IC

Affected: IC

Sec. 1. (a) The applicant shall comply with the conditions of the section 401 water quality certification.

(b) Issuance of a section 401 water quality certification does not:

- (1) relieve the applicant of its duty to comply with federal and state law or obtain such other permits or authorizations required to conduct the project;**
- (2) authorize injury to persons or private property or invasion of other private rights;**
- (3) authorize impacts or activities not detailed in the application; nor**
- (4) convey property rights or exclusive privileges.**

(Water Pollution Control Board; 327 IAC 17-6-1)

327 IAC 17-6-2 Right of entry

Authority: IC

Affected: IC

Sec. 2. (a) The department, upon presentation of proper credentials, shall be allowed by the applicant to do the following:

(1) Enter the following premises:

(A) Property that is the subject of the application, including property that is proposed as compensatory mitigation; and

(B) Property where:

- (i) records;**
- (ii) reports;**
- (iii) monitoring or treatment equipment or methods;**
- (iv) samples or other data;**

required to be provided or maintained are located.

(2) Have access to and copy the information listed in subdivision (1)(B).

(3) Inspect monitoring, treatment, or operational equipment or facility that is listed in subdivision (1)(B).

(4) Take samples.

(b) The department may authorize an employee of the department or other person under contract with the department to act as its representative.

(c) The department may conduct an inspection to determine compliance with the certification or applicable provisions of federal and state law. *(Water Pollution Control Board; 327 IAC 17-6-2)*

327 IAC 17-6-3 Enforcement

Authority: IC

Affected: IC

Sec. 3. A violation of this article, in part or in whole, may subject a person who causes or contributes to the violation to administrative or judicial proceedings pursuant to IC 13-30. (*Water Pollution Control Board; 327 IAC 17-6-3*)